

**THIRD AMENDMENT TO PARTICIPATION AGREEMENT
FOR DESIGN AND CONSTRUCTION OF STREAM RECLAMATION
IMPROVEMENTS
FOR
McMURDO GULCH**

THIS THIRD AMENDMENT TO PARTICIPATION AGREEMENT FOR DESIGN AND CONSTRUCTION OF STREAM RECLAMATION IMPROVEMENTS FOR MCMURDO GULCH (“Third Amendment”) is entered into this 19th day of November, 2024 by and between the **CHERRY CREEK BASIN WATER QUALITY AUTHORITY** (“Authority”) and the **TOWN OF CASTLE ROCK**, a Colorado municipal corporation (“Town”). The Authority and the Town are hereinafter sometimes collectively referred to as the “Parties” and singularly as a “Party.”

RECITALS

WHEREAS, pursuant to that certain Participation Agreement for the Design of Stream Reclamation Improvements for McMurdo Gulch dated October 20, 2020, as amended by a First and Second Amendment dated December 7, 2021 and June 21, 2022, respectively, (collectively the “Participation Agreement”) the Town and Authority collaborated on the design and construction of certain Improvements to McMurdo Gulch identified in a 2017 Stream Assessment prepared by Muller Engineering as the Priority 1, Priority 2, and Priority 3 Improvements; and

WHEREAS, pursuant to the Second Amendment, Authority contributed \$170,121 towards the design of the Priority 3 Improvements; and

WHEREAS, Town now desires to complete the construction of the Priority 3 Improvements and anticipates awarding a contract for the construction thereof on or before November 30, 2024, with a completion date of December 31, 2025 (“Project”); and

WHEREAS, Town has asked the Authority to contribute a total of \$1,290,347 for the Project, which amount includes the \$170,121 previously contributed by Authority; and

WHEREAS, to fund an additional contribution of \$1,120,226, the Authority has available \$251,380 currently held by the Town and not spent for the construction of the Priority 1 and 2 Improvements and \$868,846 in new funds budgeted for the Project for 2024; and

WHEREAS, the estimated total cost of the Project, including funds previously spent for design, is \$5,162,000 funded, or to be funded, by contributions from (i) a private developer in the amount of \$1,770,250 (34%); (ii) the Town in the amount of \$2,101,403 (41%); and (iii) the Authority in the amount of \$1,290,347 (25%); and

WHEREAS, the restoration of streams tributary to Cherry Creek, like McMurdo Gulch, promotes the preservation and protection of water quality in Cherry Creek and the Cherry Creek Reservoir (“Reservoir”) by reducing phosphorus loads and concentrations in both Cherry Creek and the Reservoir; and

WHEREAS, the Parties desire to amend the Participation Agreement a third time to provide for the Authority's additional contribution for construction of the Project in the amount of \$1,120,226.

NOW, THEREFORE, the Authority and Town agree as follows:

1. **Purpose of Amendment.** The purpose of this Third Amendment is to establish the procedure whereby funds will be deposited with the Town for the construction of the Project in the amounts as set forth herein.

2. **Design of the Project.** On or about September 10, 2024, the Town procured the final design and construction contract documents for the Project.

3. **Authority's Additional Contribution.** The Authority's additional contribution of \$1,120,226 will be provided to the Town in 2024, as more particularly set forth in Paragraph 6 below.

4. **Construction of the Project.**

4.1 **Construction.** Subject to Paragraph 4.2 below, with input from the Authority, the Project will be constructed by a contractor selected by Town through a competitive bid process. Except as provided in this Third Amendment, all matters relating to the construction of the Project shall be at the discretion of Town. Town shall use its best efforts to award a contract for the construction of the Project no later than November 30, 2024, and to cause the Project to be constructed and accepted for ownership and maintenance purposes, by the Town, on or before December 31, 2025.

4.2 **Bids.** After Town has received bids for construction of the Project and before a construction contract is awarded, Town will submit to the Authority a summary of the bids received ("Bid Summary"), together with Town's recommendation as to which contractor the Town recommends be awarded a contract for construction of the Project.

The Authority shall have the right to review the Bid Summary and notify Town of any objections to Town's recommendation within ten (10) days of receipt of the Bid Summary and Town's recommendation. Town will consider any objection raised by the Authority, but the Town may award a contract to a bidder as to which the Authority has objected and not withdrawn that objection, but only after consultation with the Authority and due consideration of the Authority's objection. Town will require that the construction contractor ("Contractor") provide performance and payment bonds for the Project, in the full amount of the contract price, and to name the Authority as an additional obligee on such performance and payment bonds.

If the bids for any reason are not acceptable to Town and Town does not award a contract for construction of the Project, all funds delivered by the Authority to Town under Paragraph 6 below shall be returned to the Authority as soon as reasonably practical.

4.3 **Insurance.** The Town shall cause the contractor to whom a contract for construction of the Project is awarded to obtain general liability insurance in an amount not less

than \$2,000,000 per occurrence and \$2,000,000 in the aggregate and to name the Authority as an additional insured.

4.4 Construction in Accordance with Approved Plans. The Town will cause the Project to be constructed in accordance with the construction plans as approved by the Town and the Authority and prepared by the design engineer retained by the Town.

4.5 Reports. Town shall provide Authority periodic updated and written reports concerning the construction of the Project. Unless otherwise agreed, said periodic reports shall be provided to the Authority no less frequently than monthly.

4.6 Meetings. At any time and in particular, following receipt of any periodic report, the Authority shall have the right to request a meeting with Town to review any Authority concerns or obtain any additional information that Authority may request concerning the Project. If the Authority has concerns, Town agrees that it will address those concerns as soon as practical, but in no event later than twenty (20) days from the date such concerns are raised by the Authority and delivered in writing to Town. In the event the Authority's concerns are not addressed to the Authority's satisfaction, the Authority shall have a right to appeal to the Project Engineer who shall render a written decision within ten (10) days from the date of the appeal. The decision of the Project Engineer shall be final.

In addition to the foregoing, Town shall include Authority in construction progress reports and in the distribution of all construction meeting minutes. Authority's attendance may be periodic, depending upon how work progresses and the availability of the Authority's representative.

4.7 Change Orders. In addition to the provisions set forth in Paragraph 7 below, in the event there is a proposed change order to the construction contract for the Project, the Authority must approve the proposed change order, if as a result of the change order the Authority would be obligated to contribute funds for the Project in excess of the \$1,120,226 agreed upon herein. The Authority shall have no obligation to contribute funds to the Project in excess of the \$1,120,226 authorized herein unless an appropriate written amendment to the Participation Agreement, as amended by this Third Amendment, is executed by the Authority or otherwise agreed to by the Authority's Board of Directors.

4.8 Record Drawings. Upon completion of the Project, the Town shall provide Authority with record drawings that include any and all changes to the Project from the approved plans.

5. Authority and Town Contributions. If the Total Project Cost exceeds \$5,162,000, any amount of the excess shall be paid for by the Town or the private developer, unless Authority agrees voluntarily to contribute additional funds. Based upon an estimated Total Project Cost of \$5,162,000, the amount to be contributed by the Parties hereto and the Private Developer referenced in the recitals is as follows:

<u>Party</u>	<u>Contribution</u>	<u>Percentage of Total Project Cost</u>
Town	\$2,101,403	41%
Authority	\$1,290,347	25%
Private Developer	\$1,770,250	34%
TOTAL	\$5,162,000	100%

6. **Payment of Authority Funds.** From funds appropriated by the Authority for calendar year 2024, the Authority shall contribute \$868,846, and from the Authority funds held by the Town for the construction of Priority 1 and 2 Improvements, the Town shall transfer said funds to this Project in the amount of \$251,380 (collectively “Authority’s Funds”), which transfer and payment is hereby approved and authorized. The Authority’s contribution of the new funds to be contributed thereunder, \$868,846, shall be delivered to the Town within 30 days after receipt of an invoice therefor from Town.

7. **Use of Funds and Disbursement from Bank Accounts.**

7.1 **Use of Funds.** Unless otherwise agreed to in writing by the Authority, the Authority’s Funds shall be used solely for the construction of the Project.

7.2 **Disbursement.** The Authority requires, and Town agrees, that Town shall provide the Authority with a copy of each pay application for the Project so the Authority can review each pay application as set forth in Paragraph 7.3 below. It is agreed that the Authority’s Funds will be used to pay 25% and no more, of each approved pay application, but in no event shall the Authority’s additional contribution to the Project exceed \$1,120,226 without the Authority’s prior written consent.

7.3 **Approval of Pay Applications.** A copy of each pay application for payment submitted by the Contractor with respect to the Project shall be provided to the Authority’s representative, who shall have ten (10) days to review and approve the same. Failure of the Authority’s representative to object to any pay application within said ten (10) day period shall be deemed approval of the pay application. Once a pay application has been approved, it shall be funded pro-rata from the Authority’s Funds, the Town’s Funds, and the Private Developer’s Funds, in accordance with the provisions of Paragraph 7.2 above.

If the Authority’s representative objects to all or any portion of a pay application, the Authority and Town shall immediately meet to discuss the same and resolve the issue. The Authority shall have the right to provide all input it deems relevant to any pay application and the Authority’s objections shall be given due consideration by Town. If the Authority is not satisfied or still objects to a pay application after Town has made a determination, Town shall have the right to proceed with the pay application subject to Authority’s contribution limit set forth in Paragraph 7.2 above.

7.4 **Monthly Accounting.** Town shall provide a monthly accounting to the Authority, showing the amount and for what purpose the Authority’s Funds were spent on the Project during the preceding calendar month. The accounting to be furnished to the Authority shall be as detailed as the Authority may reasonably require. Upon completion of the Project, Town shall also provide the Authority with a final accounting of the Project’s expenditures which shall

include, in detail, all costs and expenses incurred by Town in connection with the construction of the Project. If the Total Project Cost is less than \$5,162,000, the Authority shall be entitled to a refund of 25% of the unspent funds so that the Authority's total contribution does not exceed 25% of the Total Project Cost.

8. **Ownership and Maintenance of Project.**

8.1 **Project Site.** Town agrees and represents Town shall construct the Project within easements required for the Project and/or on real property the Town owns in fee, and that the Authority and Town shall have the ability to access the Project during construction and as to the Town, for maintenance purposes thereafter.

8.2 **Ownership and Maintenance of the Project.** Upon completion and acceptance of the Project by Town, Town shall own, operate, maintain and replace or make arrangements for the Project to be owned, operated and maintained by an appropriate governmental entity as determined by the Town and approved by Authority.

8.3 **Access of Authority to Project.** As such time as construction of the Project is initiated, Town agrees that the Authority shall have the right of reasonable access to the Project for observation of construction activities and any subsequent general operation and maintenance, to the extent that Authority deems such access advisable.

9. **Miscellaneous.**

9.1 **Governing Law.** The Parties agree this Third Amendment shall be governed by and construed in accordance with the laws of the State of Colorado.

9.2 **Successors and Assigns.** This Third Amendment shall be binding upon and inure to the benefit of the Parties and their successors and assigns; provided, however, that neither Party may assign their rights and obligations under this Agreement without the written consent of the other Party.

9.3 **No Third Party Beneficiary.** It is specifically agreed between the Parties executing this Third Amendment that it is not intended by any of the provisions of any part of this Third Amendment to create a third-party beneficiary hereunder, or to authorize anyone not a Party to this Third Amendment to maintain any claim under Amended Participation Agreement as hereinafter defined.

9.4 **Entire Agreement; Amendments.** This Third Amendment, including exhibits, if any, contains the entire understanding of the Parties with respect to this subject matter hereof. The Participation Agreement, as amended by this Third Amendment ("Amended Participation Agreement") supersedes all prior agreements and understandings between the Parties with respect to its subject matter. The Amended Participation Agreement may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns.

9.5 **Notice and Communications.** Any notice pursuant to the terms and conditions of the Amended Participation Agreement shall be in writing and delivered personally, or sent by certified mail, return receipt requested, or sent by a recognized overnight mail or courier

services, with delivery receipt requested, to the following addresses (or to such other address as may from time to time be specified in writing by the Parties):

If to the Authority: Executive Committee
Cherry Creek Basin Water Quality Authority
PO Box 3166
Centennial, Colorado 80161

With a copy to: Elysa Loewen
Loewen Engineering, Inc.
7388 S. Revere Parkway (Unit 601)
Centennial, Colorado 80112

And with a copy to: Timothy J. Flynn, Esq.
Ireland Stapleton Pryor & Pascoe, PC
1660 Lincoln Street, Suite 3000
Denver, CO 80264

If to Town: David Van Dellen
Town of Castle Rock
175 Kellogg Court
Castle Rock, CO 80109

With a copy to: Michael Hyman, Esq.
Town Attorney
Town of Castle Rock
100 Wilcox Street
Castle Rock, CO 80104

Notices shall be effective when received by the party to whom addressed.

9.6 Designated Representative. In regard to all Project documents and communications, including but not limited to, change orders, pay applications and construction contract amendments, the Authority designates Elysa Loewen or her designee, as its representatives with each having the power to bind the Authority subject to the limitations set forth in Paragraph 5; provided, however, that no Authority representative shall have authority to amend the Amended Participation Agreement.

9.7 Default/Remedies. In the event of a breach or default of the Amended Participation Agreement by any Party, the non-defaulting party shall be entitled to exercise all remedies available at law or in equity, specifically including suits for specific performance and/or monetary damages. In the event of any litigation, arbitration or other proceeding to enforce the terms, covenants or conditions hereof, the prevailing party in such litigation, arbitration or other proceeding shall be entitled to obtain as part of its judgment or award its costs and reasonable attorneys' fees. The authorization by Town of a payment to the construction Contractor that has been objected to by the Authority, shall constitute a breach of the Participation Agreement as amended hereby, if Town's approval was unreasonable under the circumstances.

9.8 Force Majeure. Wherever there is provided in the Participation Agreement as amended hereby, a time limitation for performance by the Parties for any obligations related to the design and construction of the Project, the time provided therefore shall be extended for as long as and to the extent that the delay in compliance with such limitation is due to an act of God, strikes, labor disputes, inability to obtain labor or materials or reasonable substitutes therefor, fire or other casualty and other causes beyond the control of the Parties.


9.9 Counterpart Execution. This Third Amendment may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

9.10 Governmental Immunity. Nothing herein shall be construed as a waiver of the rights and privileges of Authority or Town pursuant to the Colorado Governmental Immunity Act, § 24-10-101, et seq., C.R.S., as amended from time to time.


[SIGNATURE BLOCK TO FOLLOW]

IN WITNESS WHEREOF the Parties have executed this Third Amendment as of the day and year first above written.

**CHERRY CREEK BASIN WATER QUALITY
AUTHORITY**, a quasi-municipal corporation and
political subdivision of the State of Colorado

By: _____
Joshua Rivero, Chair

Attest:

_____
John McCarty, Secretary/Treasurer

ATTEST:

TOWN OF CASTLE ROCK,
a Colorado municipal corporation

Lisa Anderson, Town Clerk

Jason Gray, Mayor

Approved as to form:

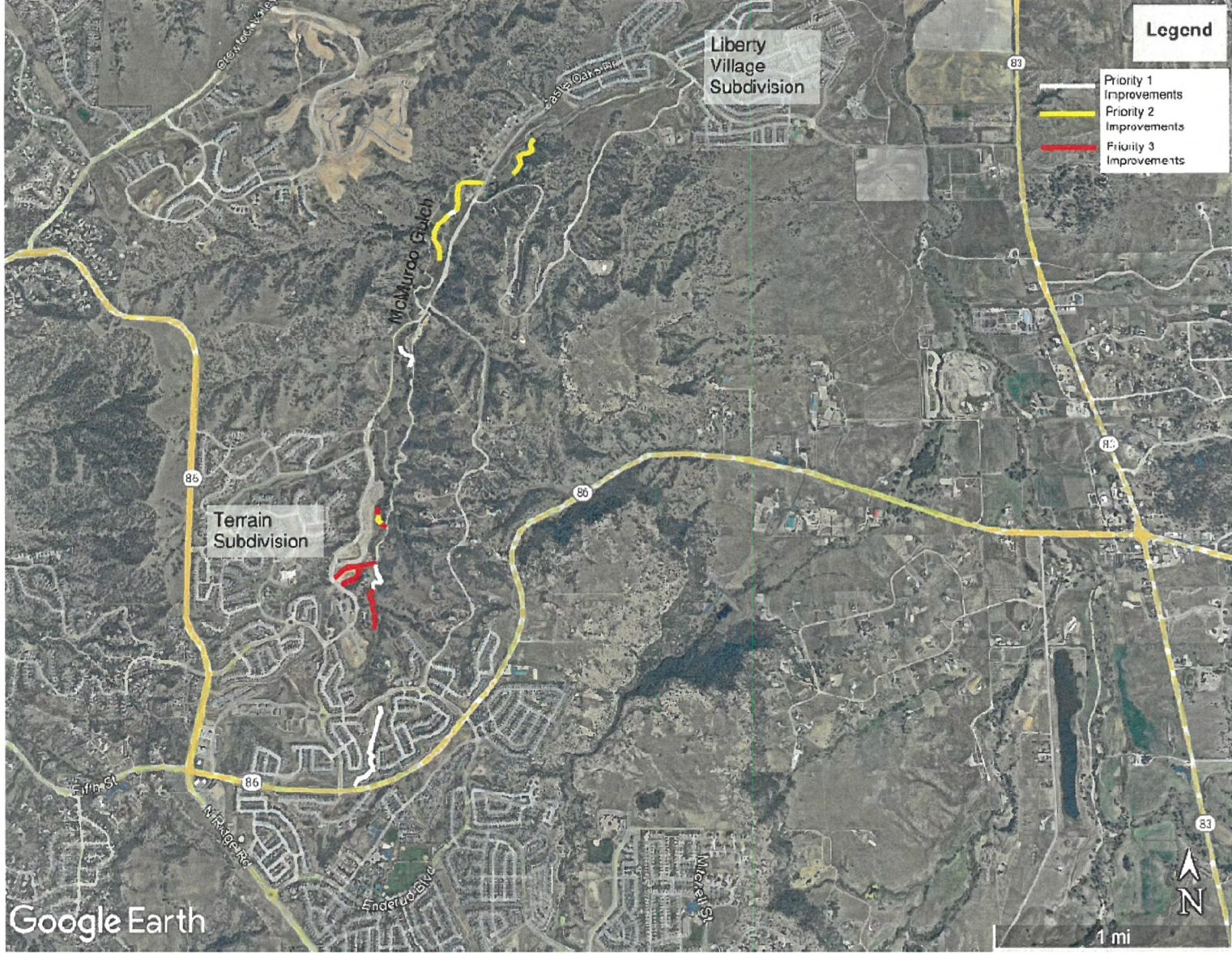
Approved as to content:

Kaitlin Parker, Assistant Town Attorney

Mark Marlowe, Director, Castle Rock Water

EXHIBIT A

McMurdo Gulch Project Priority 3











Third Amendment McMurdo Gulch Participation Agreement (5509152)

Final Audit Report

2024-10-16

Created:	2024-10-16
By:	CCBWQA Manager (manager@ccbwqa.org)
Status:	Signed
Transaction ID:	CBJCHBCAABAA__YvF-9topskdmK-0Aup40FpJs8-ns1V

"Third Amendment McMurdo Gulch Participation Agreement (5509152)" History

-  Document created by CCBWQA Manager (manager@ccbwqa.org)
2024-10-16 - 7:41:45 PM GMT - IP address: 70.59.15.194
-  Document emailed to John McCarty (johnmccarty1972@gmail.com) for signature
2024-10-16 - 7:41:52 PM GMT
-  Document emailed to Josh Rivero (jrivero@parkerco.gov) for signature
2024-10-16 - 7:41:52 PM GMT
-  Email viewed by Josh Rivero (jrivero@parkerco.gov)
2024-10-16 - 8:05:40 PM GMT - IP address: 75.71.24.205
-  Document e-signed by Josh Rivero (jrivero@parkerco.gov)
Signature Date: 2024-10-16 - 8:06:34 PM GMT - Time Source: server- IP address: 75.71.24.205
-  Email viewed by John McCarty (johnmccarty1972@gmail.com)
2024-10-16 - 9:29:45 PM GMT - IP address: 172.226.136.0
-  Document e-signed by John McCarty (johnmccarty1972@gmail.com)
Signature Date: 2024-10-16 - 9:30:48 PM GMT - Time Source: server- IP address: 97.139.215.55
-  Agreement completed.
2024-10-16 - 9:30:48 PM GMT

